

regulations of section 251 are "essentially equivalent" to the fundamental unbundling requirements of ONA and that the type and level of unbundling under section 251 is different and more extensive than that required under ONA.<sup>21</sup>

Section 251 breaks out basic elements of the telephone network and, therefore, consistent with ONA, these should now be made available to ESPs. Nevertheless, while the Commission may have determined certain boundaries for the unbundling required under section 251, ONA should contain no outer boundaries other than what is technically feasible at any given point in time. ONA should support a process of continuous unbundling driven by the innovative inspirations of both the BOCs and the requesting ISPs. The essence of ONA is that what may not be technically feasible today may be technically feasible tomorrow.

**2. Section 251-Driven Competition Will Not Eliminate The Need To Guard Against Access Discrimination.**

The Commission suggests that ESPs are uniquely positioned to benefit from an increasingly competitive local exchange market driven by section 251.<sup>22</sup> The Commission anticipates that

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<sup>21</sup> See *FNPRM* at paragraph 31.

<sup>22</sup> See *id.* at paragraph 33.

driven by section 251.<sup>22</sup> The Commission anticipates that carriers with direct rights under section 251 will compete with the BOCs to provide ESPs with the basic network services that ESPs need to create their own information service offerings. According to the Commission, this will create incentives for the BOCs to provide an increased variety of telecommunications services to ESPs at lower prices in response to the market presence of such competitors.

ATSI argues in more detail below that the BOCs do not seek teleservice providers as customers; rather, the BOCs seek the customers of teleservice providers.<sup>23</sup> If it were even possible that one day competing carriers could cause the BOCs to actively and aggressively market their network functions and features to competing ESPs, that day has not arrived and should not be expected in the foreseeable future. The BOCs' historic behavior can only suggest that they will gladly give up the business of teleservice providers, along with the safeguards originally conceived under *Computer II*, *Computer III* and *ONA*.

The Commission ignores the natural urges of the monopoly

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<sup>22</sup> See *id.* at paragraph 33.

<sup>23</sup> Neither have the BOCs demonstrated a pricing sensitivity that addresses the needs of ESPs; instead, the BOCs consistently deny requests for network functions and features based on economic feasibility.

resulting from the BOCs' control of the telephone network. The Commission also ignores the significance of the telephone network to ESPs like teleservices providers: it sets the standard for quality that may not be reproduced by other carriers and it provides long-term reliability that new providers have not yet been able to demonstrate. Also, carriers will have their own motives that may not be in service to all enhanced or information service providers. In order to guarantee the access to section 251-type unbundling that the Commission envisions, the Commission must extend these interconnection opportunities directly to ESPs. This is consistent with ONA and it avoids the tenuous hypothesis that BOCs and other carriers will seek out opportunities to market network elements to ESPs.

**3. Not All Enhanced And Information Service Providers Are Alike.**

The Commission characterizes the information services market as "truly competitive," pointing to the growth of the Internet and the entry of industry giants into the information services industry as evidence of market forces sufficient to eliminate the threat of access discrimination.<sup>24</sup> This characterization,

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<sup>24</sup> See FNPRM at paragraph 36.

however, fails to recognize the various market categories within the information services landscape. No such industry giants have entered the teleservices business with an economic presence that might effectively monitor and challenge the threat of access discrimination on the part of the BOCs. The fact is that the BOCs continue to own and control the telephone network, and teleservice providers, today as in the past, must rely on this same network to compete.

**D. COMPETITION IN THE LOCAL EXCHANGE MARKET SHOULD NOT BE RELIED UPON TO RELAX OR REPLACE SAFEGUARDS.**

**1. Entities In Control Of The Network Cannot Be Relied Upon To Create A Level Playing Field For Their Competitors.**

The Commission restates its proposition that competition in the local exchange and local access market is the best safeguard against anticompetitive behavior on the part of the BOCs in the information services market and that BOCs will be unable to engage successfully in discrimination and cost misallocation to the extent that competing ESPs have alternative sources for access to network functions and features.<sup>25</sup>

ATSI strongly disagrees with the Commission's proposition

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<sup>25</sup> See *id.* at paragraph 49.

that when other telecommunications carriers compete with the BOCs in providing access services to ESPs, the BOCs will be less able to engage successfully in discrimination because they will risk losing the business from their ESP customers.

The BOCs can only compete on one level: either as competitive service providers or as providers of network access to competitive service providers. The Commission, however, expects that the BOCs will be able to do both. This is simply not a legitimate proposition. It adds nothing to the effort to determine what basic safeguards are required to prevent competition-driven urges. The test of true competition is the aggressive and enthusiastic marketing of goods and services to potential customers. On the one hand the Commission expects the BOCs to aggressively seek out ways to provide ESPs with network access. On the other hand, the Commission expects the BOCs to compete with these same ESPs in the information services market that the telephone network supports.

**2. The Test Of True Competition Is The Enthusiastic And Aggressive Effort To Develop Business Relationships And To Accommodate The Essential Needs Of The Customer.**

The Commission must recognize that the BOCs have demonstrated no effort to date to develop a special marketing

relationship with teleservice providers. The very essence of *Computer II*, *Computer III*, and *ONA* is the recognition that the BOCs have a competition-driven disincentive to support their ESP competitors. It therefore must be concluded that the BOCs do not seek the network access business from competing ESPs. This business BOCs will willingly give up, and from their perspective, they will willingly give it up to lower quality and less reliable services that competing telecommunications carriers may at best be able to offer. The BOCs seek the customers of teleservice providers, not the access business from teleservice providers. If this is not the case for other ESPs or ISPs, the Commission must consider the unique relationships that exist between the BOCs and their competitors in the different information services markets. No member of ATSI has reported receiving the type of support or incentives from their local BOC offices to make greater use of the telephone network that would evidence a desire on the part of the BOCs to assist ESPs towards improving their current enhanced services.

While recognizing that BOCs remain the dominant providers of local exchange and exchange access services in their in-region states, the Commission foresees the time when the need for regulation of the BOCs to safeguard against access discrimination

will be eliminated.<sup>26</sup>

ATSI vigorously disagrees with this vision of the future offered by the Commission. This is premature speculation at best, and it reveals the Commission's unjustified rush towards a final chapter for *Computer III* and ONA.<sup>27</sup> Equally objectionable is the fact that the Commission is prepared to immediately replace certain safeguards with the self-interest of new entrants in the local exchange markets. The Commission seems to be prepared to allow the BOCs and other carriers determine what access opportunities will exist in local markets and leave the policing of access discrimination to the ESPs.

It is most likely that the BOCs will remain in the foreseeable future the dominant providers of local exchange and exchange access services in their in-region states. As new entrants, telecommunications carriers will likely seek only the most lucrative markets for purposes of exploiting their section 251 rights. They will deploy network functions to meet the needs of specific industry sectors. Given their need to immediately

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<sup>26</sup> See *id.* at paragraph 51.

<sup>27</sup> The Commission's expectation that competition will eliminate the need for any safeguards in the enhanced services market merely reveals its long-standing preference to be discharged of its duties to require and challenge the BOCs to enter the competitive market for enhanced services on a level playing field.

establish profitable market niches and to saturate these ahead of any competitors, these carriers are likely to view the needs of small businesses like teleservice providers as an unwelcomed diversion from the purposes of their market entry. It should be expected, therefore, that the BOCs will continue to be in a position to deny ESPs access to the telephone network and will not willingly seek out ways to deploy network applications for ESPs.

Furthermore, the same competitive motives that drive the BOCs to limit network access must also be attributed to telecommunications carriers with section 251 interconnection rights who will participate as competitors in the enhanced and information services markets. ATSI agrees, therefore, that these carriers should be required to unbundle their network functions and features and offer these to other ESPs and ISPs under the same tariffed terms and conditions under which they provide such services to their own information services operations.<sup>28</sup>

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<sup>28</sup> See *FNPRM* at paragraph 42.



**E. CEI PLANS AND CERTAIN REPORTING REQUIREMENTS CONTINUE TO SERVE AN IMPORTANT PURPOSE AND IN NO WAY INTERFERE WITH THE INNOVATIVE CAPABILITIES OF THE BOCs.**

**1. CEI Serves As An Important Safeguard Against Network Access Inequality.**

ATSI disagrees with the Commission's tentative conclusion that the BOCs should no longer be required to file CEI plans or to obtain approval for those plans prior to providing new intraLATA information services.<sup>29</sup> The Commission states that CEI plans are no longer necessary to protect against access discrimination because the BOCs are now providing information services pursuant to approved ONA plans.<sup>30</sup>

The Commission continues to push the relaxation of safeguards ahead of the realization of true ONA deployment. ONA originally promised complete unbundling of service components that would allow ESPs to use the network's most fundamental building blocks to construct their own innovative services as easily as the BOCs. In the past, the Commission has described the ability of competing ESPs to design offerings that utilize network services in a flexible and economical manner as

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<sup>29</sup> See *id.* at paragraph 61.

<sup>30</sup> See *id.*

essential.<sup>31</sup> Because ONA has not been deployed to its most fundamental building blocks, ESPs have not yet been afforded these opportunities; therefore, it is inappropriate to eliminate current CEI filing requirements at this time.<sup>32</sup>

The Commission states that (1) the substantial administrative costs associated with BOC preparation and agency review of CEI plans outweigh their utility as an additional safeguard against access discrimination and that (2) the time and effort involved in the preparation and review of the CEI plans may delay the introduction of new information services by the BOCs without commensurate regulatory benefits.<sup>33</sup>

The Commission's explanation is incomplete. The Commission fails to define the utility that the CEI plans currently serve in its oversight responsibilities. The Commission also finds it unnecessary to elaborate on the costs associated with BOC preparation of the plans. Given the competition-driven

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<sup>31</sup> See *California III* at page 927.

<sup>32</sup> ATSI has already commented on the Ninth Circuit's concern that the Commission has retreated from its original justification of *Computer III* and ONA safeguards. The market for the enhanced services offered by ATSI members has not changed and the 1996 Act does not supplant current safeguards. Despite its attempts in this *FNPRM*, the Commission fails to justify the direction in which it would take the *Computer III* and ONA regimes; therefore, ATSI argues that the Commission must return to its original concepts.

<sup>33</sup> See *FNPRM* at paragraph 63.

incentives that the BOCs have to limit network access and ONA deployment that would benefit ESPs, until the network's most fundamental building blocks are available, CEI plans make available essential information. Also, given the Commission's vision of a truly competitive local exchange market, it is appropriate to retain current CEI and ONA safeguards until the BOCs and other carriers engage in the market-driven efforts expected by the Commission and begin to deploy network functions and features that are in support of the services offered by ESPs.

ATSI further objects to the Commission's tentative conclusion that at a minimum the CEI-plan requirement should be eliminated for BOC intraLATA information services provided through an Act-mandated affiliate under section 272 or 274.<sup>34</sup> The Commission makes the point that a BOC may choose to provide a seamless information service to customers that combines both interLATA and intraLATA components of such service, and to require the BOC to receive approval under a CEI plan for the intraLATA component of such service "is likely to delay" the provision of integrated services that would benefit the public.

ATSI strongly objects to the Commission's willingness to make the very arguments that the BOCs should be advancing on

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<sup>34</sup> See *id.* at paragraphs 66 through 72.

their own. The Commission should allow the BOCs to describe how such approvals would significantly delay the provision of integrated services that will benefit the public. The BOCs should indicate the specific services that have been prevented by current safeguards. The Commission also fails to identify what amount of time would represent a delay adverse to the public.

**2. Reporting Requirements May Be Consolidated, But Information Reported Must Not Be Eliminated.**

As part of its biennial review of regulations, the Commission considers the various reporting requirements under *Computer III* and ONA that serve as safeguards and promote competition.<sup>35</sup> ATSI encourages the Commission to seek opportunities to eliminate or reduce the costs and inefficiencies created by the preparation of CEI plans and other reports; however, ATSI argues that the Commission must not eliminate the information currently reported. The Commission's goal, prior to the realization of true ONA deployment, should be to determine how CEI and other safeguards might be more efficiently maintained, reported and reviewed.

The Commission should consider the elimination of a specific

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<sup>35</sup> See *id.* at paragraphs 99 through 116.

element of the CEI plan only if that element no longer serves a needed safeguard function based on actual market experience. ATSI rejects all efforts to justify the elimination of current safeguards based on the inability of the BOCs to be innovative in the use of the telephone network. Furthermore, the fact that information reported does not change significantly between reporting periods,<sup>36</sup> or that the 1996 Act imposes similar reporting requirements,<sup>37</sup> does not justify the elimination of reported information.

The Commission must also place the burden of argument on those who would eliminate specific information from current reporting requirements. The question should be why the information is no longer needed to provide assurances that the opportunity for access discrimination will no longer exist. It should also be noted that the Commission is free to revisit these same reporting requirements during its next biennial review of regulations.

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<sup>36</sup> See *id.* at paragraph 104.

<sup>37</sup> See *id.* at paragraph 122.

**F. NETWORK ACCESS REQUEST PROCEDURES SHOULD CREATE OPPORTUNITIES FOR PRO-COMPETITION OUTCOMES.**

The Commission asks whether the current ONA requirements have been effective in providing ESPs with access to the basic services that ESPs require in order to provide competitive enhanced services.<sup>38</sup>

The current ONA requirements have not prevented the BOCs from denying the requests of teleservice providers for access to certain network functions and features necessary to their provision and deployment of innovative competitive services.

The Commission asks whether the ONA 120-day request process established to help ESPs obtain new ONA services has been effective<sup>39</sup> and whether the NIIF helps ESPs obtain basic services from the BOCs and GTE.<sup>40</sup>

While not utilized as frequently as in the past or as anticipated by the Commission, the 120-day request process and the NIIF forum do create an essential framework for ESPs to participate in the development of new applications for network elements. Nevertheless, they generally do not create the desired

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<sup>38</sup> See *id.* at paragraphs 85 through 90.

<sup>39</sup> See *id.* at paragraph 88.

<sup>40</sup> See *id.* at paragraph 89.

pro-competition result of providing new functions and features to ESPs. Instead, they provide the BOCs with an escape route from the ONA goals: if an ONA service is determined to be technically feasible by the NIIF, the BOCs are able to deny a request on other grounds, including economic feasibility. One ATSI member requested the IILC to consider the technical feasibility of abbreviated call forwarding activation. This feature would allow the teleservice provider's customer to route after the first ring all incoming calls to his voice messaging service. After the IILC found that abbreviated call forwarding activation was technically feasible, the ATSI member then requested access to this feature from the local BOC office. On Day-119, the BOC denied the request based on grounds that the feature was not economically feasible. Not only does this deny one ESP the opportunity to respond to a specific telecommunications customer's need, but it clearly limits the ESPs' ability to create larger applications of the same feature among similar customers and markets.

An essential goal of ONA and the 120-day request process is to allow ESPs to drive innovation through requests and access to network functions and features. It is intended to allow innovative network deployment that the BOCs on their own are not planning. In reality, the BOCs have no incentives to accommodate

ESP requests and they have demonstrated an unwillingness to deploy new ONA services to their competitors prior to the time that they themselves are prepared to utilize the same functions for their own services. The opposite, however, is not true. The BOCs will protect and preserve new market opportunities for themselves by denying access to functions and features that would allow ESPs to compete with or complement new BOC offerings.

The Commission should amend the 120-day request process by requiring the BOCs to file with the Commission and make available in an appropriate public record justifications for all denials made to ESPs. These should be subject to public comment, and the Commission should vigorously question denials as impediments to innovation and new information services deployment. Furthermore, for every denial of ONA services found by the NIIF to be technically feasible, the BOCs should be required to file a plan for its deployment. Currently, if a function is found to be technically feasible by the NIIF, the BOCs will consistently find that it is not economically feasible.



#### IV. CONCLUSION

ATSI argues that the Commission's tentative conclusions to retain nonstructural separation and to retreat from other *Computer III* and ONA safeguards are not justified by current market conditions. The Commission inappropriately assumes that competition between the BOCs and other telecommunications carriers will serve as the ultimate safeguard against network access discrimination and that the entry of large ISPs into the local exchange markets will provide the necessary policing power to detect and deter other discriminatory practices on the part of the BOCs.

ATSI argues that neither the BOCs nor carriers with section 251 rights can be relied upon to serve the needs of enhanced service providers. ATSI also argues that these entities, if they intend to use their network access privileges to support their own information services, will have a natural, competition-driven disincentive to support the needs of ESPs.

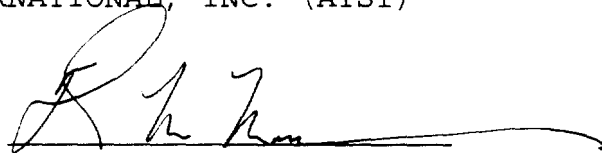
The BOCs continue to use their control of the network to deny ESPs access to new functions and features and to market their enhanced services to the customers of ESPs requesting basic telephone features. Structural safeguards are the only means to prevent the opportunity of such discriminatory behavior from

occurring. Existing *Computer III* and ONA safeguards continue to be necessary in order to help level the playing field and to help detect discriminatory behavior. The Commission should re-impose structural separation to the BOC provision of enhanced services and preserve the safeguards and pro-competition mechanisms of *Computer III* and ONA.

Respectfully submitted,

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April 3, 1998